IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 882

PERCY O. MAGNUS, *Petitioner*,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

BORIS KOSTELANETZ
52 Wall Street
New York, New York

EUGENE GRESSMAN
1730 K Street, N. W.
Washington, D. C.

LOUIS BERGER
LLOYD A. HALE
225 Broadway
New York, New York

Counsel for Petitioner

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PETITIONER'S REPLY BRIEF

Petitioner files this brief to point out certain misconceptions, omissions and concessions in the Brief in Opposition on behalf of the United States which serve to reflect and underscore the appropriateness of review of the case by this Court.

I.

The Government does not deny that the trial judge misquoted the *Spies* opinion in twice telling the jury that wilfulness under § 7203 requires "a failure with an evil motive, a want of justification in view of all the financial circumstances of the taxpayer." But the Brief in Opposition errs (pp. 7-8) in (a) ascribing to petitioner the argument that *Spies* requires that the jury be instructed that there must be an "evil motive *and* want of justification" and (b) asserting that the jury charge was in any event adequate.

The critical fact is that, regardless of whether the statement of this Court in *Spies* be regarded as dictum, the trial judge himself elevated the *Spies* misquotation into a standard for the jury to adjudge wilfulness under § 7203. It was the trial judge, not the petitioner, who sought to fuse the elements of "evil motive" and "lack of justification." And by equating those two elements by means of the misquotation, the trial judge —with the approval of the Second Circuit—created a standard of wilfulness completely at odds with this Court's *Murdock* rule and with the Third Circuit's decision in *Palermo,* as well as with other Circuit decisions. See Petition, pp. 20-21.

Indeed, the Government is now in agreement with petitioner that evil motive is the dominant element of wilfulness and that there is no need "further to show some independent want of justification" (Op. Br. 9). But the trial judge, by misquoting *Spies,* permitted the jury to rely exclusively on a "want of justification" as the equivalent of the essential "evil motive"—a position which the Government does not and cannot take. The Government's understandable fail-

ure to support the charge as given only emphasizes the prejudicial error contained in the instructions.

Moreover, nothing in the charge served to overcome that error. The Government seeks (Op. Br. 9) to draw some curative balm from the remark of the trial judge that "there must be *something more* than a conscious, deliberate and purposeful failure in order to constitute wilfulness." [Emphasis added.] But that remark immediately preceded the *Spies* misquotation and the "something more" was precisely the erroneous equation of "evil motive" and "want of justification" contained in that misquotation. Thus the concededly improper equation permeated the entire instruction on wilfulness, thereby creating the basis for review and correction by this Court.

II

The Government's effort to distinguish the *Sansone* principle and its own prosecuterial policy as announced to this Court in its *Sansone* brief completely overlooks the vital factor which petitioner contends makes that principle and that policy fully applicable here. The Government relies exclusively (Op. Br. 12) on the established and conceded premise of *Sansone* that "a disputed factual element" with respect to an affirmative act of evasion makes it permissible to charge and submit to the jury both the felony and misdemeanor counts.

But the important problem raised by the Second Circuit's decision in this case is whether such an element can be considered "disputed" if the dispute involves only the inferences and conclusions as to wilfulness to be drawn from the conceded fact that the

petitioner authorized the showing to revenue agents of his retained copies of the tax returns. The Second Circuit sought (Pet. App. 4a-5a) to create a dispute in connection with that conceded fact by asserting that petitioner's belief that his returns had been filed and his taxes paid might have been credited by the jury, in which event his directions to cooperate with revenue agents "could not be interpreted as an authorization to represent falsely what, by hypothesis, Magnus believed to be true."

In other words, the Second Circuit ruled that, even where the overt act of evasion is conceded, a denial that the act was wilful—a denial formulated in terms of defendant's beliefs and the conclusions to be drawn therefrom by jury or court—creates a dispute as to the existence of the affirmative acts of evasion. The *reductio ad absurdum* of the Second Circuit's analysis is that a plea of not guilty, grounded on the taxpayer's belief that his conceded failure to pay taxes was not wilful, would in itself create a disputed issue as to the affirmative act of evasion, the failure to pay. But the *Sansone* decision of this Court has already established that a dispute centered on the issue of wilfulness as to a conceded act of filing a false tax return does not create a dispute as to the affirmative act of evasion and hence does not entitle one to a lesser-included offense charge. See 380 U.S. at 352. It would follow that the dispute in this case as to the inferences of wilfulness surrounding the conceded act of showing the retained copies of the tax returns to the revenue agents is such as to make it improper to permit the misdemeanor conviction to stand following the acquittal on the felony charge.

The need for clarification of this problem, however, is made obvious by the confusion and inconsistency surrounding the Second Circuit's opinion and the Government's Brief in Opposition.

As to the Government's prosecutorial policy, the Government now claims (Op. Br. 13) that this policy, solemnly announced to this Court without benefit of stated exceptions (see Petition, p. 26, fn. 10), of not authorizing prosecutions under § 7203 when an affirmative act of evasion is charged—a policy so strong that all prosecutions were to be abandoned and prior punishments redressed—is "necessarily subject to some exceptions" and "was not designed to announce an absolutely inflexible standard." But the Government does not explain what kind of an exception justifies the determination not to drop the instant § 7203 prosecution. At the time the Government revealed its policy to this Court the combined felony-misdemeanor indictment in this case was still pending, the trial not yet having commenced. At that juncture, it could not have been known what factual element of evasion would be disputed or conceded. The disputes, if any, could be determined only during the course of the trial. By what token, then, is the announced policy of "abandoning all prosecutions" of misdemeanors where an affirmative act of evasion is charged not applicable here?

III

Finally, the Government concedes (Op. Br. 9) that petitioner's defense "was that his failure to pay was not wilful because he believed that the taxes had in fact been paid." And neither the Government nor the Second Circuit disputes that petitioner's late payment

of taxes was probative of his aforesaid defense of lack of wilfulness. But the Government then proceeds to argue (Op. Br. 10) that, notwithstanding the charge of the trial court that the late payment of taxes in question was "not a defense to the charge" of wilful failure to pay his taxes, this did not preclude the jury from considering such belated payments with respect to petitioner's defense of lack of wilfulness.

This circular argument proves too much. The undenied error of the trial court in refusing to allow the jury to consider the evidence of belated payments as a defense or as evidence of good faith effectively precluded the jury from considering that evidence on the critical issue of wilfulness. How can the Government now assert that the jury was free to consider this evidence when the trial court told the jury that it was "not a defense"? Indeed, it was this charge which destroyed the argument of petitioner's counsel to the jury (see Op. Br. 11, fn. 2) that late payment was evidence of petitioner's good faith or lack of wilfulness. None of the general language of the charge permitting the jury to consider all the evidence before it on the issue of wilfulness could overcome the specific rejection of this evidence respecting late payments. And combined with the uncontradicted procedural morass created by the Second Circuit's ruling respecting petitioner's failure to request instructions on this matter (see Petition, pp. 29-32), the erroneous instructions cannot be considered harmless or lacking in importance for certiorari purposes.

CONCLUSION

For these various reasons, supplementing those set forth in the Petition, a writ of certiorari should issue. Indeed, so egregious is the error respecting the misquotation of the *Spies* decision and so plain is the Government's inability to sustain the erroneous charge as given and as affirmed by the Second Circuit that petitioner suggests that consideration be given to the appropriateness of a summary reversal of the judgment below without further briefing or argument.

Respectfully submitted,

BORIS KOSTELANETZ
52 Wall Street
New York, New York

EUGENE GRESSMAN
1730 K Street, N. W.
Washington, D. C.

LOUIS BENDER
LLOYD A. HALE
225 Broadway
New York, New York

Counsel for Petitioner

February 2, 1967.